

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RODGER D. RABBASS
Claimant

VS.

ROBINSON'S DELIVERY SERVICES, INC.
Respondent

AND

AMERICAN INTERSTATE INS. CO.
Insurance Carrier

Docket No. 1,030,070

ORDER

STATEMENT OF THE CASE

On February 4, 2010, the Kansas Court of Appeals reversed and remanded the Board's February 24, 2009, Order in this case for further consideration in accordance with *Bergstrom v. Spears Manufacturing Company*¹. The Board heard oral argument on May 4, 2010. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Richard S. Fisk, of Overland Park, appeared for respondent and its insurance carrier (respondent).

The record considered by the Board and the parties' stipulations are listed in the November 6, 2008, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh and the February 24, 2009, Order entered by the Board.

ISSUES

Claimant asks the Board to enter an order consistent with the mandate from the Court of Appeals. Claimant argues he is entitled to a 100 percent wage loss as per *Bergstrom*, and the Board found he had an 80 percent task loss in its Order. Claimant is asking the Board to find he has a 90 percent work disability, minus a preexisting functional disability of 5 percent as per the Board's previous Order. Further, claimant argues there is no statutory provision to allow the Board to reconsider the issues of permanent

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

restrictions and task loss. Claimant notes this issue was not raised before the Court of Appeals. Claimant also argues that respondent cannot raise an argument that claimant is not entitled to a work disability because there was no functional impairment resulting from claimant's work injury because the issue was not raised before the ALJ.

Respondent asserts that the holding in *Bergstrom* regarding the issue of wage loss does not resolve all issues in this case. Respondent argues that because the Board found in its Order of February 24, 2009, that claimant had no additional rateable permanent impairment of function from this injury, and because there remain questions concerning claimant's permanent work restrictions, claimant is not entitled to entry of an Award. Respondent asks the Board to remand this matter for further consideration.

FINDINGS OF FACT

On November 6, 2008, the ALJ entered an Award finding that claimant was entitled to a work disability. However, the ALJ found that claimant had not made a good faith effort to find other employment and imputed a wage to the claimant of \$10.50 per hour. This wage was less than 90 percent of claimant's preinjury average weekly wage, and the ALJ computed his wage loss to be 28 percent. The ALJ also found that claimant had a 0 percent task loss. Accordingly, the ALJ computed claimant's work disability to be 14 percent. The ALJ found that claimant had a 5 percent preexisting functional disability, which he subtracted from the work disability, making claimant's total general permanent disability 9 percent.

The ALJ's Award was appealed to the Board, and on February 24, 2009, the Board entered its Order wherein it found:

Claimant has no additional rateable permanent impairment of function from this injury and, because he failed to make a good faith job search and is capable of earning 90 percent or more of his preinjury average weekly wage, he is not entitled to an award of work disability.²

The Board further found: "Claimant has a 5 percent preexisting impairment and no additional impairment of function per the *AMA Guides* and, therefore, there is nothing against which to apply a credit."³

The Board's Order was appealed to the Court of Appeals. After a show cause order was issued, the Court of Appeals summarily reversed the Board's Order pursuant to *Bergstrom* and remanded the matter to the Board for further consideration.

² *Rabbass v. Robinson's Delivery Services, Inc.*, Docket No. 1,030,070, 2009 WL 607641 (Kan. WCAB Feb. 24, 2009).

³ *Id.*

PRINCIPLES OF LAW

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-501(c) states: “The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.”

Where the evidence in a workers’ compensation case supports the trial court’s finding that the claimant suffered a work disability but no functional disability, proof of functional disability is not a prerequisite for recovery under K.S.A. 44-510e.⁴

In *Hart*,⁵ the Kansas Court of Appeals held:

In this case, we have a specific finding by the Board, supported by substantial competent evidence, that the claimant suffered *no* permanent

⁴ *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 348, Syl. ¶ 2, 783 P.2d 348, *rev. denied* 245 Kan. 784 (1989).

⁵ *Hart v. Bott Family Farms*, No. 99,895, 206 P.3d 72, unpublished Court of Appeals opinion filed April 24, 2009, *rev. denied* ___ Kan. ___ (March 9, 2010). Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.

impairment. We agree with Bott that the language of K.S.A. 44-510e(a) necessarily precludes a finding that claimant is entitled to work disability under this circumstance.

ANALYSIS AND CONCLUSION

An injured worker need not have a rateable permanent impairment under the AMA *Guides* in order to prove a disability. The *Hart* case is distinguishable because in that case, the Board found no permanent injury and that claimant failed to prove he had permanent work restrictions. Here, claimant was determined to have a work-related injury which resulted in permanent work restrictions which were greater than his prior restrictions for his preexisting condition.

The Board finds that claimant's restrictions resulting from his back injury are different and more extensive than his previous restrictions. Claimant's restrictions from his previous low back injury were no lifting greater than 50 pounds, no frequent or continuous bending or twisting, and avoid repetitive stooping, bending and lifting, whereas the restrictions recommended by Dr. Koprivica are to avoid frequent or constant lifting or carrying and occasional lifting or carrying should be limited to 20 pounds with no lifting from the floor. Claimant's captive sitting should be limited to 30 minutes, and he should have flexibility to get up more frequently if necessary. Standing and walking should be limited to intervals of 15 to 30 minutes with the allowance of sitting if necessary. He also restricted claimant from squatting, crawling, kneeling or climbing.⁶

In its Order of February 24, 2009, the Board also found claimant has an 80 percent task loss and a 100 percent actual wage loss. The Board further found that claimant had a preexisting functional impairment of 5 percent. Pursuant to K.S.A. 44-510e(a) and the mandate from the Kansas Court of Appeals, the Board finds claimant has a 90 percent permanent partial disability. Pursuant to K.S.A. 2009 Supp. 44-501(c), respondent is entitled to a 5 percent credit based upon claimant's preexisting impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Board's Order of February 24, 2009, is modified to find that claimant has a 90 percent permanent partial general disability and that respondent is entitled to a 5 percent credit for claimant's preexisting impairment, leaving claimant's permanent partial disability for this accident to be 85 percent.

Claimant is entitled to 15.43 weeks of temporary total disability compensation at the rate of \$391.39 per week or \$6,039.15, followed by permanent partial disability

⁶ *Rabbass v. Robinson's Delivery Services, Inc.*, Docket No. 1,030,070, 2009 WL 607641 (Kan. WCAB Feb. 24, 2009).

compensation at the rate of \$391.39 per week not to exceed \$100,000 for an 85 percent work disability.

As of May 6, 2010, there would be due and owing to the claimant 15.43 weeks of temporary total disability compensation at the rate of \$391.39 per week in the sum of \$6,039.15, plus 206.43 weeks of permanent partial disability compensation at the rate of \$391.39 per week in the sum of \$80,794.64, for a total due and owing of \$86,833.79, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$13,166.21 shall be paid at the rate of \$391.39 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Richard S. Fisk, Attorneys for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge